LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
JUL 28 1961
JAMES R. BROWNING, Clerk

No. 215

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

C. R. GOSLIN ET AL., *Appellants*,

vs.

JULIA BEAZLEY ET AL., *Appellees*.

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS.

APPELLEES' STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

NOWLIN RANDOLPH,
506 Niels Esperson Building,
Houston 2, Texas,
ROLLAND BEADLEY,
1307 South Coast Building,
Houston 2, Texas,
JOEL W. COOK,
632 Bettes Building,
Houston 2, Texas,
Attorneys for Appellees.

R. L. Mimeographing, Inc., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

INDEX

Reasons for Dismissing or Affirming 1

I. Appellants Did Not Assign These Alleged Errors in the State Court 2

II. Questions Nos. 1 and 2 Present No Federal Question 3

III. Question No. 3 Does Not Submit a Substantial Federal Question 3

Conclusion 5

Table of Cases

Blackwell v. *Farmers & Merchants National Bank*, 76 S.W. 454; 97 Tex. 445, 79 S.W. 518 4

Dotson v. *Burchett*, 301 Ky. 28, 190 S.W.2d 697 4

Ex Parte Largent, 162 S.W.2d 419 4

Herndon v. *Georgia*, 295 U.S. 441, 79 L. Ed. 1530, 55 S. Ct. 794 3

Roberson v. *U. S.*, 249 F.2d 737, 72 A.L.R.2d 434 4

Other Authorities

72 A.L.R.2d 467 4

Article 1 of Section 15 of the Constitution of Texas 2

Rule 56 of the Federal Rules of Civil Procedure 3

Rule 166-A of the Texas Rules of Civil Procedure 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 215.

C. R. GOSLIN ET AL., *Appellants*,

vs.

JULIA BEAZLEY ET AL., *Appellees*.

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS.

APPELLEES' STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

REASONS FOR DISMISSING OR AFFIRMING.

The appellees show the court that this appeal should be dismissed (or, at all events, that the same should be affirmed) for the following reasons: (1) The questions now presented to this court were not affirmatively urged or presented to the state court. (2) No substantial federal question is raised.

I. Appellants Did Not Assign These Alleged Errors in the State Court.

At page two of appellants' brief the statement is made that they affirmatively urged throughout the proceedings that they were constitutionally entitled to a trial by jury and that the nature of their constitutional attack is more specifically shown on pages six and seven of their motion for rehearing filed in the Supreme Court of Texas (Item 25, Transcript).

A search of the record reveals that appellants never presented the three questions now urged as constitutional questions in either the Supreme Court of Texas or the Court of Civil Appeals for the First Supreme Judicial District. Pages six and seven of their motion for rehearing in the Supreme Court of Texas show that they stressed only one specific constitutional provision, Article 1 of Section 15 of the Constitution of Texas. No reference whatever is made to the Constitution of the United States except to say that the right to trial by jury is "further guaranteed by the Bill of Rights in our United States Constitution" (page 6) and to say that the framers of the state and federal constitutions were prudent men and were very careful to see that the right to trial by jury should never be denied (page 7).

The appellants had many opportunities to urge the constitutional questions now presented by their first and second questions. Their points of error in their brief in the Court of Civil Appeals (pages 1 to 4, Item 27, Transcript) are barren of any point on these questions. Their motions for rehearing which they filed in the Court of Civil Appeals (Items 20 and 21, Transcript) are without any assignment of error upon which they can predicate any of their three questions. The motion for rehearing in the Court

of Civil Appeals, appearing as Item 21 of the Transcript, does say that the voluntary recusation of the Chief Justice violated a provision of the Texas Constitution, but it does not even mention the Constitution of the United States.

The application for writ of error in the Supreme Court of Texas (Item 26, Transcript) and the motion for rehearing in that court (Item 25, Transcript) affirmatively reveal that the three questions now presented were never presented as questions involving the Constitution of the United States.

It is elementary that the specific provision of the Constitution upon which the appellant wishes to rely must be called to the state court's attention, *Herndon* v. *Georgia*, 295 U.S. 441, 79 L. Ed. 1530, 55 S. Ct. 794.

II. Questions Nos. 1 and 2 Present No Federal Question.

Basically the complaint presented in the first two questions by the appellants is that Rule 166-A of the Texas Rules of Civil Procedure violates the due process clause of the Fourteenth Amendment. But Rule 166-A is an almost exact copy of Rule 56 of the Federal Rules of Civil Procedure.

It is submitted that it is no longer an open question in this court as to whether Rule 56 is constitutional.

III. Question No. 3 Does Not Submit a Substantial Federal Question.

The facts must be stated more clearly than they have been set forth by the appellants. The appellees moved that the Chief Justice recuse himself as disqualified because he had represented the appellant C. R. Goslin in a suit which was brought for Goslin's disbarment (Item 14, Transcript).

The appellants vigorously opposed this motion and insisted that the Chief Justice was not disqualified (Item 15, Transcript). The Court of Civil Appeals overruled the appellees' motion requesting the Chief Justice to recuse himself as disqualified for the reason that he was not disqualified, but on his own motion the Chief Justice recused himself from further participation (Item 16, Transcript). Thereafter, as shown by the opinion of the Court of Civil Appeals, the Chief Justice removed his own recusation and sat in the case. No complaint was made by the appellants in their motion for rehearing filed after the opinion was delivered (Item 20, Transcript). It was almost a month later that the appellants first complained that the Chief Justice had sat in the case (Item 21, Transcript).

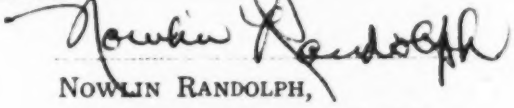
Appellants are thus placed in the remarkable position of contending that the Chief Justice is disqualified because he, the Chief Justice, at one time represented the appellant Goslin in other litigation.

Reference is made to a case cited but not discussed by the appellants, *Dotson* v. *Burchett*, 301 Ky. 28, 190 S.W.2d 697, for a full review of the authorities. That discussion shows clearly that erroneous recusation may later be set aside by the judge who took the prior action.

Since the prior representation of the appellant Goslin was in a different case from that now before the court, the Chief Justice was not disqualified 72 A.L.R.2d 467; *Roberson* v. *U. S.*, 249 F.2d 737, 74 A.L.R.2d 434; *Ex Parte Largent*, 162 S.W.2d 419; *Blackwell* v. *Farmers & Merchants National Bank*, 76 S.W. 454; same case, 97 Tex. 445, 79 S.W. 518.

CONCLUSION.

It is respectfully submitted that the grounds of jurisdiction do not exist and that no substantial federal questions are shown and that the appeal should be dismissed or, if for any reason that action is not deemed proper, that the cause should be affirmed.



NOWLIN RANDOLPH,
506 Niels Esperson Building,
Houston 2, Texas,

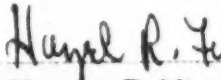
ROLLAND BRADLEY,
1307 South Coast Building,
Houston 2, Texas,

JOEL W. COOK,
632 Bettes Building,
Houston 2, Texas,
Attorneys for Appellees.

I certify that I have served upon Levert J. Able, Esq., attorney for the appellants, a copy of the foregoing statement opposing jurisdiction and motion to dismiss or affirm by mailing the same by certified mail to him at 11th Floor, 711 Main Building, Houston 2, Texas.

NOWLIN RANDOLPH.

Sworn to and subscribed before me on this the 25th day of July, 1961.



Notary Public in and for
Harris County, Texas.